Hellhole-Proof South Carolina's Justice System
Codify per comparative negligence as polling overwhelmingly supports

Historically South Carolina was a "Contributory Negligence" state when allocating liability in civil court. That meant injured plaintiffs who contributed to their injuries were barred from suing others to recover damages.

In 1991 a new-majority state Supreme Court activated judicial law, effectively flipping that doctrine, declaring the imposition of "Comparative Negligence."[(1)] The Decision implied all contributors are to be compared and liability apportioned, unless the plaintiff was more at fault than the defendant(s).

But the landmark ruling was incomplete, without clear administrative instructions. In instances like that, it is necessary the legislature fill in the blanks or rectify activism they find adverse to culture.

But for 34 years they have bowed to trial lawyers, failing to properly, fully codify the Court's proclaimed "more equitable doctrine."[(2)] That negligence created a vacuum whereby aggressive injury lawyers and the judges they elected over time could shape "common law" by precedent. Quickly, in some quarters, a 1% at-fault party became liable for 100% of damages.

Inevitably, left unchecked, inconsistency and unpredictability grew, terms and standards got stretched, unbalancing the system. This degradation led to abuses and "judicial hellholes," where self-interest drives excessive demands chasing windfall payouts. This is evidenced today by ubiquitous lawsuit marketing, not a few controversies, outright corruption, and worse.

After decades of stiff-arming, business and fair-minded citizens thought they had finally positioned a Bill-fix in 2005. But bad-faith language replete with exceptions neutered it.

Despite the Constitutional right to a jury trial and lawyers' cries of "let the jury decide," the system denies juries' ability to account for all involved on the Jury Verdict Form. Plaintiffs can choose who to sue and settled-out parties contribute to a void of fault on the form. Confoundingly, the law requires the jury to find 100% of fault between only those on the form. The result is judgement stacking, with the target being the deepest pocket, and a question of constitutionality.

A different, more conservative Supreme Court called out the flaws. Both majority and minority dissents implied the results are not necessarily good public policy, but insisted it is indeed a legislative responsibility to write clear law.[(3)] That was in 2017. Still no action, despite almost 90% of voters in our Republican Presidential Primary agreeing – in 2020 and again in 2024 - that people should be responsible only for their share of fault.

(1) Nelson v. Concrete Supply, 1991
(2) Langley v. Boyter, 1984
(3) Smith v. Manchin, 2017

All the while, the 2008[4] court vacated precedent unleashing a barrage of unbridled discovery demands, mistake-mining, and insurance-hunting creating open season, lawsuits within lawsuits, against commercial activities. Prior, injury litigation generally ended when employers accepted liability for the actions of their employees. Only when it was readily apparent that truly reprehensible conduct was at hand were cases sent to a jury for punitive damages. That put the state among a minority and ended an era of geniality and reason across the Bar.

In 2011[5] the court imposed greater jeopardy for those who make mistakes. Noting the long "troublesome question of the distinction to be made in the degrees of negligence," they acquiesced, deciding "negligence in any form" triggers a jury's power to punish with punitive damages. "Ordinary negligence, gross negligence, and reckless, willful or wanton conduct" were deformed into synonymity. Lower court judges, they deferred, were to provide definitions and instructions to the jury…on these indistinguishable distinctions. Maybe emphasis would help with the inevitable confusion. Dramatic, prejudiced emphasis became the tactic of the contingency fee lawyer. The guardrails were wiped out.

This haphazard system produces economic casualties in the form of coerced, fear-based "grossly inflated" settlements. Between what fair restitution should be and what is paid in the end lies an enormous "dollar delta," likely in the hundreds of millions annually in this state alone. Close to half is the contingency fee bounty going to a very small, protected class.

Witness incentivized, sanctioned economic lawfare: pervasive lawsuit marketers chase collisions making demands far greater than their actuarial "value" to coerce excessive settlements to avoid a jury inflamed by emphatic claims of indistinguishable "reckless" conduct. The irresistible potential for a massive windfall attracts powerfully connected lawyers, "Big Law" in small towns.

Management is responsible for its decisions but can't control every action of their employees. Sectors and activities vary, but they buy insurance to protect earned assets and provide reasonable restitution to the injured. This is commerce. But unpredictable, unlimited risk, and being vulnerable to paying for the responsibilities of others, is unfair and unsustainable. This is fundamentally "anti-producer."

Our sister citizens, our competitors, don't suffer from this racket-like system. South Carolina's "pro-business" legislature remains stuck, unable to break free and separate themselves from the Contingency Fee Caucus.

Incremental reforms to this system will not solve this crisis of cumulative injustice. Political inertia accelerates social inflation and sanctions insurance fraud. They have a duty to clear the stains, reform the deformed, level liability, and restore confidence in our civil justice system.

Isn't it time to end the monetization of mistakes? The downstream effects are cultural and ethical erosion, with lawsuit taxes paid by every consumer through insurance and cost of goods and services.

(4) James v. Kelly, 2008
(5) Berberich v. Jack, 2011